Supreme Court, U.S.
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No. 07 - 114

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

* * * * *

ROBERT BURNS,
*Petitioner,*

vs.

STATE OF MISSOURI,
*Respondent.*

* * * * *

**ON PETITION FOR WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS WESTERN DISTRICT**

* * * * *

# PETITION FOR WRIT OF CERTIORARI

* * * * *

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## QUESTION PRESENTED

Whether the Missouri Court of Appeals erred in denying relief by reformulating the *Strickland v. Washington* prejudice standard to require Mr. Burns to show that witnesses not called by trial counsel would have provided him with a "viable defense"?

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## PETITION FOR WRIT OF CERTIORARI

The Petitioner, Robert Burns, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the Missouri Court of Appeals rendered in these proceedings on January 23, 2007.

## OPINION BELOW

The unpublished order and memorandum of the Missouri Court of Appeals is reprinted in the Appendix at page 1a, *infra*. The unpublished order of the Missouri Court of Appeals denying rehearing is reprinted in the Appendix at page 45a, *infra*. The unpublished order of the Missouri Supreme Court denying transfer is reprinted in the Appendix beginning at pages 46a, *infra*.

## JURISDICTION

The judgment of the Missouri Court of Appeals, was entered January 23, 2007. A timely petition to that court for rehearing or, in the alternative, for transfer to the Missouri Supreme Court was denied February 27, 2007. A timely application to the Missouri Supreme Court for transfer was denied on May 1, 2007.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

**U.S. CONST. Amend. VI**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in this favor, and to have the assistance of counsel for his defence.

**U.S. CONST. Amend. XIV, §1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

## STATEMENT OF THE CASE

**Summary.** This petition concerns the denial of post-conviction relief to Mr. Burns on the ground that his trial counsel's failure to call witnesses who would have corroborated his testimony and that of his wife and co-defendant was not prejudicial to him.

**Facts and procedural history.** Mr. Burns was tried jointly with his wife, Marsha Burns (Mrs. Burns), who was

represented by separate counsel. Evidence presented at trial showed that Mrs. Burns had left Mr. Burns, taking her children with her, and traveled from their home outside Kansas City, Missouri to southern Missouri where she took refuge in a shelter for battered women and children. Subsequently, two of the Burns children, Robert, Jr. and Erica, told authorities that both Mr. and Mrs. Burns had molested them. The children testified at trial that their parents had committed improper sexual acts. Mrs. Burns testified at trial that after she arrived in southern Missouri, she told the children to accuse their father of abusing them so that Mr. Burns would not be able to get custody of the children, but that in fact, neither child had been molested by either herself or Mr. Burns. Her testimony and other evidence indicated that at the time she left Mr. Burns, she was suffering from severe post-partum depression. Mr. Burns also testified at trial, and denied any improper acts. No physical evidence of abuse was presented at trial.

The jury convicted both Mr. and Mrs. Burns, and recommended sentences on Mr. Burns totaling 120 years, which were imposed by the trial court.

Renea Comstock met Mrs. Burns before Mrs. Burns was charged when both were in a homeless shelter and apartment complex in southern Missouri. Ms. Comstock overheard Mrs. Burns coaching the children to maintain their story that Mr. Burns had molested them. Ms. Comstock also talked to the children herself, and learned that they were unhappy about having to tell this story, but were doing so to support their mother. Ms. Comstock lost touch with Mrs. Burns when Mrs. Burns was arrested..

Ms. Comstock learned of the charges against Mr. and Mrs. Burns for the first time, after they were convicted, by reading the Kansas City Star in the public library in

Springfield, Missouri. She then contacted Mrs. Burns's attorney, provided an affidavit in support of Mr. and Mrs. Burns's motion for new trial, and testified at the hearing on the motion for new trial. At that hearing, the prosecutor presented affidavits from the minor children indicating that they had not discussed the matter with Ms. Comstock.[1] The prosecutor also presented testimony that the Kansas City Star was not available in the Springfield public library. This testimony was later shown to be mistaken; the Kansas City Star representative testified at the post-conviction hearing that he was unaware that the paper was delivered by mail in Springfield.

Mr. Burns's motion for new trial was denied, and his conviction was affirmed on direct appeal. App. 47a, *infra.* He then filed a motion under Mo. Sup. Ct. R. 29.15 for post-conviction relief, alleging, *inter alia*, ineffective assistance of counsel for failure to investigate and call witnesses. The motion court held an evidentiary hearing on Mr. Burns's motion. The following evidence was presented at the hearing.

Trial counsel did not interview or call as witnesses a number of people, listed for him by Mr. Burns, who could have testified that the Burnses had a good and normal relationship with their children. These witnesses included Shawn Callahan and Regina Jones, both of whom had spent considerable time as children at the Burns home and never observed the pervasive abuse described by Robert, Jr. and Erica Burns. Rhonda Jones Allen, the mother of Regina, Mr. Burns's sister, was present at the trial but was not called. Connie Sherman, Don Smith, and Jeff and Kathy Ramseier all knew Mr. Burns from work, and had spent time with him and his family and observed the interaction between the

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[1] The prosecutor argued that the children had said they did not even know Ms. Comstock, but this statement was not supported by the children's affidavits.

Burns parents and their children. All would have been willing to testify at trial concerning their relationship with the Burns family and the fact that they never observed any abnormalities, but were never contacted by trial counsel.

Trial counsel acknowledged that he had not contacted any of these witnesses. He described them as "character" witnesses (despite the fact that they would have testified to their personal observations of the family rather than to character traits) and said that he felt that they would have been subject to harmful cross-examination.

Angela Bustamonte, the sister of Mrs. Burns, testified at the post-conviction hearing that before leaving town after leaving their home, Mrs. Burns and the children came to Ms. Bustamonte's beauty shop to get some money for a place to stay that night. Mrs. Burns told Ms. Bustamonte that Robert, Sr. had molested her son and daughter. Ms. Bustamonte went to the daughter and told her that this was not her fault and that her father was not supposed to have sex with her. The daughter appeared not to know what Ms. Bustamonte was talking about. This testimony was consistent with Mrs. Burns's trial testimony that she concocted the molestation story only after arriving in southern Missouri. Trial counsel did not interview Ms. Bustamonte before trial, he testified at the post-conviction hearing that he had left the investigation of witnesses to be called from Mrs. Burns's family to counsel for Mrs. Burns.

Trial counsel also failed to interview and call as a witness Ray Smith. Ray Smith, a cousin of Mr. Burns, came to the Burns home to return a piece of furniture a few days before Mrs. Burns left with the children. Mr. and Mrs. Burns and their children were there. While he was there, Mrs. Burns asked him to engage in sexual activity. Mr. Burns discovered the two of them in the bedroom, became angry

and asked Mr. Smith to leave. Both Mr. and Mrs. Burns testified at trial that this incident occurred and was part of Marsha Burns's motive for leaving Robert Burns and fabricating a story of child abuse, but their testimony was uncorroborated.

Trial counsel had reviewed a written statement from Mr. Smith, but never interviewed him. Mr. Smith would have been available to testify, and in fact, wanted to do so. Trial counsel decided not to interview or call Mr. Smith because there was a joint defense with Mrs. Burns and he felt that this testimony would be harmful to her.

Trial counsel failed to investigate Mrs. Burns's activities or associates during the time she was in southern Missouri before the children were taken into state custody. He left this investigation to counsel for Mrs. Burns; her attorney testified that he had not performed such an investigation either. For this reason, neither attorney discovered the testimony of Ms. Comstock before trial.

The motion court denied post-conviction relief, and its decision was appealed to the Missouri Court of Appeals, Western District. The court of appeals sidestepped the "performance prong" of *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), and determined that the failure to call all of the witnesses listed above was not prejudicial because they would not have provided Mr. Burns with "a viable defense." For example, in connection with the failure to call the witnesses who could have testified to their observations of the Burns's normal family life, the court held, "The witnesses' observations of 'normal family interactions' would not have established that the complained of acts did not occur." App. 6a. The court of appeals further held that the testimony of Ms. Comstock would not have established a "viable defense" because her testimony was cumulative of

the trial testimony of Mrs. Burns, so that Ms. Comstock did not establish a new or different defense.

After an unsuccessful motion for rehearing or transfer to the Missouri Supreme Court, Mr. Burns applied directly to the Missouri Supreme Court for transfer. That application was denied, and this petition follows.

## REASONS FOR GRANTING THE WRIT

### THIS COURT SHOULD GRANT REVIEW TO PREVENT STATE COURTS FROM PLACING AN IMPROPER AND EXCESSIVE BURDEN ON POST-CONVICTION PETITIONERS TO SHOW PREJUDICE FROM INEFFECTIVE ASSISTANCE OF COUNSEL.

The court of appeals held that failure to call witnesses is only prejudicial where the witness would provide a "viable defense." That assertion is an incorrect and unconstitutional application of the standard for demonstrating prejudice from ineffective assistance of counsel, because it requires more prejudice than must be shown under this Court's precedents.

In *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), this Court did not require that an omitted witness "provide a viable defense" in order for a court to find that the witness's absence was prejudicial. Rather, as to witnesses, the Court applied the same rule it applied to all instances of ineffective assistance of counsel: The error is prejudicial if there is a reasonable probability that the outcome would have been different had the error not occurred. In *Williams (Terry) v. Taylor*, 529 U.S. 562 (2000), this Court made clear that

this test still applies, and that it requires a finding of less than a preponderance of evidence of a different outcome.

In this case, the Missouri Court of Appeals used the "viable defense" standard not as a shorthand version of the "reasonable probability" test but to require far more than *Strickland* prejudice. The court held that in order to show prejudice, Mr. Burns must establish that the testimony of the uninvestigated and uncalled witnesses proved independently that the offense did not occur or that the Mr. Burns did not commit it. Thus, the fact that the observations of numerous persons who knew Mr. and Mrs. Burns made less credible the testimony of the Burns children that abuse had occurred over a long period of time was completely discounted by the court of appeals because it did not "establish" that the charged acts did not occur. [2] The fact that Ms. Comstock provided independent corroboration of Mrs. Burns's testimony was discounted because it was "cumulative" of Mrs. Burns's testimony.

This problem of Missouri law is not unique to Mr. Burns's case. The "viable defense" language has been used repeatedly in the Missouri courts. The most recent reference is in *Glass v. State*, 2007 WL 1953413 (Mo. Sup. Ct. July 3, 2007.) A typical instance of the application of the standard to deny relief is in *DeClue v. State,* 218 S.W.3d 632 (Mo. App. 2007). There the court concluded that the failure to call a witness who would have impeached the testimony of a prosecution witness as to a confession by the defendant was not prejudicial because the omitted witness did not provide a "viable defense." Other examples of the improper use of the "viable defense" standard include *Phillips v. State*, 214 S.W.3d 361 (Mo. App. 2007), where the court found that the

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[2] As the court put it, "Witnesses who merely impeach the State's witnesses do not provide movant with a defense to a charged crime." App. 6a.

failure to call several witnesses who would have cast doubt on the issue of whether the defendant's car was the only one at the scene of the crime was not prejudicial because their testimony was not "determinative." The court in *McClendon v. State*, 2007 WL 218777 (Mo. App. E.D. Jan. 30, 2007), denying relief where trial counsel failed to call a witness, made clear that under Missouri law that a witness provides a "viable defense" only when his testimony negates an element of the crime. Similarly, the court in *Whited v. State*, 196 S.W.3d 79, 83 (Mo. App. 2006), held, "When the testimony of the witness would only impeach the state's witnesses, relief on a claim of ineffective assistance of counsel is not warranted."[3]

Missouri is not the only jurisdiction with a comparable and improper standard for ineffective assistance of counsel. In *Pineo v. State*, 908 A.2d 632, 637 (Me. 2006), the court held that in order to show prejudice, a Maine defendant must demonstrate that "ineffective representation likely deprived the defendant of an otherwise available substantial ground of defense." And the Texas Court of Appeals has held that prejudice from failure to investigate is shown only if "the consequence of the failure to investigate is that the only viable defense available to the defendant is not advanced, and there is a reasonable probability that, but for counsel's failure to advance the defense, the result of the proceeding would have been different." *Hernandez v. State*, 2006 WL 397922*2 (Tex. App-San Antonio, Feb. 22, 2006), citing *Cantu v. State*, 993 S.W.2d 712, 718 (Tex. App.-San Antonio 1999, pet. ref'd).

It is significant that these cases were decided after *Williams (Terry) v. Taylor*, 529 U.S. 562 (2000), which

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[3] That this is a favorite phrase of Missouri courts is evidenced by the fact that, according to Westlaw, the terms "29.15" and "viable defense" occur together in 245 Missouri opinions.

clearly established that the *Strickland* prejudice standard must be applied. Despite this direct guidance, however, state courts, particularly in Missouri, continue to attempt to limit relief by various reformulations of the *Strickland* standard that place an increased burden on the petitioner.

Under a correct application of the *Strickland* test, Mr. Burns is entitled to relief.[4] The omitted witnesses in his case would have corroborated his testimony and that of his wife and co-defendant. But under Missouri law, the omission of such witnesses can *never* be prejudicial because they do not, by themselves, establish a defense or negate the defendant's commission of the offense. The Missouri Court of Appeals reasoned that corroboration evidence is "cumulative," and therefore its omission can never be prejudicial. But evidence is not "cumulative" where it relates to a disputed issue. As the Seventh Circuit put it in *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000),

> The impact of three more witnesses corroborating Washington's alibi would not have been "cumulative" as the Wisconsin Court of Appeals believed. Evidence is cumulative when it "supports a fact established by existing evidence," BLACK'S LAW DICTIONARY 577 (7th ed. 1999), but Washington's whereabouts on the day of the robbery was far from established—it was the issue in the case.

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[4] Mr. Burns acknowledges that the court of appeals did not find that counsel's failure to investigate and call these witnesses was unreasonable, turning instead directly to the prejudice question. This Court, of course, has emphasized that "strategic" decisions like those here, made without the benefit of full investigation, are not entitled to much weight. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

Like the whereabouts of Washington in the *Smith* case, whether the Burns children were fabricating their allegations of abuse was "far from established." It was the focus of Mr. Burns's defense. The testimony of Ms. Comstock that she overheard Mrs. Burns coaching the children and that the children admitted to her that they were lying did not pertain to an issue which was otherwise established, and its omission was highly prejudicial.

The Sixth Circuit has also addressed the contention that multiple witnesses to the same facts are not necessarily cumulative:

> This evidence plainly would have bolstered [the petitioner's] defense and was anything but cumulative.... [The petitioner] had just one witness at trial (Greenlee) who could support his alibi defense. Doubtless, three other witnesses, who like Greenlee did not previously know [the petitioner] and accordingly had no axe to grind in testifying on his behalf, would have aided the defense.

*Bigelow v. Williams*, 367 F.3d 562, 565 (6th Cir. 2004).

Other courts also find the failure to present corroboration evidence clearly prejudicial under the *Strickland* standard. For example, in *Stewart v. Wolfenbarger*, 468 F.3d 338, 358 (6th Cir. 2006), the court found prejudice where omitted witnesses who corroborated alibi testimony "would have added a great deal of substance and credibility to [the petitioner's] alibi.". And in *Smith v. Dretke*, 417 F.3d 438, 443 (5th Cir. 2005), the court found prejudicial the failure to call witnesses who would have corroborated the defendant's testimony about the violent nature of the victim, noting, "Without corroboration. . . [the

defendant's] statements were easily discounted by the prosecuting attorney. . ."

In the above-cited habeas corpus cases, the Courts of Appeal found that the state court analyses were not merely wrong, but were an unreasonable application of established federal law under 28 U.S.C. §2254(d). This case, on the other hand, is before this Court for direct review of the decision of the Missouri Court of Appeals. This Court should take the opportunity, uncomplicated by the application of 28 U.S.C. §2254, to clarify the standards state courts should use to determine *Strickland* prejudice. Because §2254(d) limits this Court's ability to grant relief for state court errors in the application of this Court's precedents, it is particularly important that those courts receive this court's guidance in direct review cases. At a minimum, the grant of certiorari in this case would correct a pervasive error in Missouri constitutional jurisprudence, and it would also assist the courts of other states in properly applying the law of ineffective assistance of counsel.

## CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Missouri Court of Appeals, Western District.

Respectfully submitted,

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# APPENDIX

**In the**
**Missouri Court of Appeals**
**Western District**

| | | |
|---|---|---|
| ROBERT BURNS, SR. | § | |
| | § | |
| Appellant | § | |
| | § | WD 65487 |
| v. | § | |
| | § | Filed: January 23, 2007 |
| STATE OF MISSOURI | § | |
| | § | |
| Respondent | § | |

**APPEAL FROM THE CIRCUIT COURT OF PLATTE COUNTY**
**The Honorable Owens Lee Hull, Jr., Judge**

**Before Ronald R. Holliger, Presiding Judge, Paul M. Spinden, Judge, and Lisa White Hardwick, Judge**

## ORDER

Robert Burns, Sr., appeals the circuit court's judgment denying his Rule 29.15 motion for post-conviction relief after an evidentiary hearing. We affirm. Rule 84.16(b).

**In the**
**Missouri Court of Appeals**
**Western District**

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|---|---|---|
| ROBERT BURNS, SR. | § | |
| | § | |
| Appellant | § | |
| | § | WD 65487 |
| v. | § | |
| | § | Filed: January 23, 2007 |
| STATE OF MISSOURI | § | |
| | § | |
| Respondent | § | |

## MEMORANDUM[1]

A jury convicted Robert Burns, Sr.,[2] of two counts of statutory sodomy in the first degree, two counts of child molestation in the first degree, two counts of sexual misconduct, and one count of statutory rape. Burns asserts 14 points on appeal, claiming that his attorney's representation at trial and on appeal were ineffective. We disagree.

According to Rule 29 .15(k), our review is "limited to a determination of whether the findings and conclusions of

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[1] This unpublished memorandum explains the rationale for the order affirming judgment and should not be cited in unrelated cases. Attach a copy to any motion to rehear or to transfer the case to the Supreme Court.

[2] A jury also convicted Burns' wife, Marsha Burns, of these same crimes. The parties tried their cases together, and this court affirmed the judgments. *See* State v- Robert Burns, Sr., 79 S.W.3d 911 (Mo. App. 2002), and State v. Marsha Burns, 79 S.W.3d 911 (Mo. App. 2002). After the parties filed separate 29.15 motions, the circuit court held a joint evidentiary hearing on their motions and denied the motions. The parties filed separate appeals from the denials of their post-conviction motions.

the [circuit] court are clearly erroneous." Error is clear only if we have a definite and firm impression that a mistake was made. *State* v. *Johnson,* 901 S.W.2d 60, 62 (Mo. banc 1995).

Burns' burden was to establish by a preponderance of the evidence that his attorney's representation was ineffective. Rule 29.15(i). He was obligated to show that his attorney did not "exercise the customary skill and diligence that a reasonably competent attorney would [have] exercis[ed] under similar circumstances" and that his attorney's failures prejudiced his case. *State* v. *Harris,* 870 S.W.2d 798, 814 (Mo. banc), *cert denied,* 513 U.S. 953 (1994); *Strickland* v. *Washington,* 466 U.S. 668,687 (1984). Burns' burden was to establish both his attorney's deficient performance and prejudice. *Clayton* v. *State,* 63 S.W.3d 201,206 (Mo. banc 2001), *cert. denied,* 535 U.S. 1118 (2002).

To satisfy the performance prong of the *Strickland* test, Burns "must overcome the presumptions that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment." *State* v. *Simmons,* 955 S.W.2d 729,746 (Mo. banc 1997), *cert denied,* 522 U.S. 1129 (1998). Burns faces a heavy burden in establishing a claim for ineffective assistance of counsel and must overcome the presumption that his attorney is competent. *State* v. *Nunley,* 980 S.W.2d 290,292 (Mo. banc 1998), *cert. denied,* 526 U.S. 1100 (1999).

To satisfy the prejudice prong of the *Strickland* test, Burns "must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Simmons,* 955 S.W.2d at 746. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

In his first point, Burns complains that his trial attorney's representation was ineffective for not calling as witnesses certain individuals who interacted with the family to testify about the appearance of normal family interactions between Burns, his wife, and their children. Burns' attorney testified that he had no interest in putting on witnesses to testify as to the family interactions because he feared potential questions that they would be asked on cross-examination. The attorney explained:

> Well, by that I mean people that you would call that the jury might expect they're going to say good things about your people that subject themselves to cross-examination time after time on the bad aspects of our case. I don't know how you would-I'm just saying that they don't have any specific personal knowledge about the case, but you would be asking them in general terms, "Have you seen him with his children? How do they interact? How do they get along?" which would beg a hundred of questions from the prosecutor, each one of them, and I did not want to get into that in the case.
>
> Q. So you think that if—if one of those witnesses had testified, "I—I saw him with his children and his children would come to work with him," they—they, you know, that he was conscientious with them, they could then have been—what could they have been asked beyond, "Did you ever see them—did you ever see him molest his children?"
>
> A. [The prosecuting attorney could have asked,] "What if I told you that his mother had accused him of having his little

girl come in and perform oral sex on him?" "What if"—they could have been asked a lot of questions in my opinion.

Q. Okay. You think that—that—that their testimony about their personal observations would have opened them up for that cross-examination?

A. Possibly. Yes.

An attorney's actions that constitute sound trial strategy are not grounds for ineffective assistance claims. Selection of witnesses is a question of trial strategy, and as such is "virtually unchallengeable." *Worthington v. State,* 166 S.W.3d 566,577 (Mo. banc 2005). Even if reasonable trial strategy is unsuccessful, counsel cannot be deemed ineffective. *State* v. *Dees,* 916 S.W.2d 287,301 (Mo. App. 1995), *cert. denied,* 519 U.S. 857 (1996); *State* v. *Anthony,* 881 S.W.2d 658,661 (Mo. App. 1994).

Burns asserts that his attorney's trial strategy was unreasonable because these witnesses were not character witnesses but were witnesses who would be testifying about their personal observations of the Burns family. All of the witnesses who Burns contends should have been called to testify at trial testified at the evidentiary hearing on the post-conviction motion. All of them would have testified about the appearance of normal family interactions between Burns, his wife, and their children.

Shawn Callahan, who was the nephew of Burns' wife, said that he had lived with the Burns family for several months and did not recall any unusual occurrences-either with him or any of Burns' children. Regina Jones, Burns' niece, said that she often stayed overnight at the Burnses' house and that none of the Burns' children ever said to her

that anything bad was going on between them and their parents. She also said that she never noticed any unusual occurrences. Rhonda Allen, Burns' sister, said that she and her family frequently got together with Burns' family. She said that she never saw anything that would make her suspect that something inappropriate was going on between Burns and his children and that she frequently allowed her daughter to spend the night at Burns' home. Connie Sherman, who worked with Burns for about three and a half years, said that she saw Burns' family together at company functions and that she never noticed any abnormalities in the way Burns treated his children or in the way the family interacted. Jeff and Kathy Ramseier, who were family friends of the Burnses, said that neither of them ever saw anything that made them suspect sexual abuse. Finally, Don Smith, who was Burns' cousin, said that he never noticed anything unusual about the way Burns interacted with his children, nor anything which would give him reason to believe there was some type of sexual impropriety taking place.

To establish ineffective assistance of counsel for failure to call a witness, a movant must show that the decision involved something other than reasonable trial strategy, that the witness could have been located through reasonable investigation, that the witness would have testified when called, and that the witness' testimony would have provided the movant with a viable defense. *Worthington,* 166 S.W.3d at 577. None of these witnesses would have provided Burns with a viable defense. The witnesses' observations of "normal family interactions" would not have established that the complained of acts did not occur.

In his next point, Burns contends that his trial attorney's representation was ineffective for not presenting evidence that Burns' wife had previously made false allegations that Burns had molested the children. The circuit

court failed to issue conclusions of law in regard to this issue, but we will not remand to require the circuit court to make conclusions of law on "an isolated issue that was merely overlooked by the [circuit] court when it is clear that the movant is not entitled to relief as a matter of law and no prejudice will be suffered as a result of being denied such a remand." *Clayton v. State,* 164 S.W.3d 111, 116 (Mo. App. 2005).

According to the testimony of Burns' attorney at the evidentiary hearing, he was aware that Burns' wife had previously made allegations to the Division of Family Services that Burns had abused the children. Burns' attorney said that the division's report found that there was "no evidence to substantiate Robert Burns' involvement." He said he would not have sought to introduce the report into evidence "under any circumstances."

The evidence did not establish that Burns' wife had previously made false allegations that Burns had molested the children. The division merely found that there was no evidence to substantiate Burns' involvement. It did not find that the allegations were false. The division concluded:

> Based upon the completed investigation I found reason to suspect physical abuse of Christina Burns by an unknown perpetrator. This determination is based on:
>
> 1. The picture of Christina Burns which shows marks and bruises to the back of Christina's legs.
>
> 2. Robert Burns indicated he did not cause the marks and they came from Marsha Burns. Marsha Burns indicated that she did

> not cause the marks and they come from Robert Burns. There is no evidence to indicate who placed the marks on Christina Burns.
>
> Based upon the completed investigation I find reason to suspect sexual abuse of Robert Burns Jr. by Marsha Burns. This determination is based on the following:
>
> 1. Marsha Burns indicated that she fondled Robbie because she was forced by Robert Burns. There is no evidence to show Marsha Burns was forced.
>
> 2. Marsha Burns signed a statement indicating she fondled Robbie Burns.

Because there was no evidence that Burns' wife had previously made false allegations that Burns had molested the children, Burns' attorney cannot be found to be ineffective for failing to present such evidence through the division's reports.[3]

Next, Burns asserts that his attorney should have investigated and called his wife's sister, Angela Bustamante, as a witness at trial. Burns claims that Bustamante's testimony would have supported his theory that his wife had

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[3] Burns also asserts that his attorney was ineffective because he was operating under a conflict of interest by not presenting evidence concerning the division's report in the interest of not damaging his wife's case. Burns did not present this claim to the circuit court in his Rule 29.15 motion. He is, therefore, procedurally barred from raising this claim of error here. *Barnett v. State*, 103 S.W.3d 765,773 (Mo. banc), *cert. denied*, 540 U.S. 862 (2003); Rule 29 .15( d). Burns also did not assert any conflict of interest claim in his point relied on. We review those issues raised in the points relied on only. *Helmig v. State*, 42 S.W.3d 658, 666 (Mo. App. 2001).

fabricated the allegations of sexual abuse. In particular, Bustamante testified at the evidentiary hearing that Burns' wife went to where she worked before leaving town with the children. Bustamante said that she told Burns' daughter that "it's not acceptable and it's not all right. It's not supposed to be-you're not supposed to have sex with your father." According to Bustamante, Burns' daughter looked at her as though she did not know what Bustamante was talking about. Such testimony, Burns asserts, shows that his wife had not yet concocted the story about the sexual abuse and had not coached his daughter yet to lie about the sexual abuse.

To prevail on an ineffective assistance of counsel claim based upon inadequate investigation, Burns' burden was to show that his attorney knew or should have known of the Bustamante's existence, that she could have been located through reasonable investigation, that she would have testified when called, and that her testimony would have provided Burns with a viable defense. *Crooks v. State,* 131 S.W.3d 407,410 (Mo. App. 2004). Burns did not establish that his attorney knew or should have known of Bustamante's existence. Burns' attorney said at the evidentiary hearing that he did not recall any information from either Burns or his wife about any evidence or testimony from Bustamante. Because the attorney was unaware of Bustamante as a potential witness, he cannot be faulted for failing to call her as a witness.

To the extent that Burns asserts that his attorney's representation was ineffective because he should have asked Marsha Burns' attorney for the names of witnesses who could corroborate Marsha Burns' story, his contention is without merit. The circuit court found that, despite Marsha Burns' claims to the contrary, Marsha Burns never told her attorney about Bustamante. We defer to the circuit court's determination of credibility. *Williams* v. *State,* 111 S.W.3d 556, 563 (Mo. App. 2003).

Burns also asserts that Bustamante would have corroborated his wife's testimony that she was sexually abused by their father and would have clarified the testimony of Burns' mother by explaining that a prior allegation by Burns' wife concerned the Burns' son, Robert Burns, Jr., and not Burns. This testimony, however, would not have provided Burns with a viable defense to the crimes.

Burns asserts that his attorney's representation on appeal was ineffective because he did not present evidence and argue that Burns could not have discovered Renea Comstock as a witness before trial. He asserts that had such an argument been presented, this court would have reversed the circuit court's denial of his motion for new trial based on newly discovered evidence. We disagree.

As part of their defense at trial, Burns' wife testified that, when she took her children to Springfield during August 1999, she feared that her husband would take the children. For this reason, she said, she wanted to invent a story that would make her husband "look as bad as [she] could make him look-so they would keep him from getting the kids." She claimed that she told the children what to say and how to lie about the sexual abuse. Burns asserts that Comstock's testimony would have supported his defense that the sexual abuse allegations were fabricated. Comstock testified at the evidentiary hearing that Burns' wife had told her that she had fabricated the stories concerning the sexual abuse and that Burns' wife had told the children to lie about the sexual abuse. Comstock said that Burns' wife had given her a letter wherein she admitted fabricating the allegations and expressed remorse for doing so. Comstock also testified that she had talked with Burns' children and that they admitted to her that they were lying about the abuse.

Burns asserts that, because he and his wife filed a joint brief in the direct appeal, the brief did not distinguish

between the availability of the evidence concerning Comstock to Burns versus his wife. He contends that he never met or heard of Comstock, so he had even less reason to be aware of Comstock than his wife did.

In his direct appeal, Burns challenged the circuit court's denial of his motion for new trial based on newly discovered evidence. Although Burns and his wife filed a joint brief, the appeals were not consolidated; therefore, this court issued separate decisions in the cases. In dealing with Burns' contention about Comstock's testimony, this court found:

> To obtain a new trial on this ground, the Burnses must establish that they learned of the evidence only after the trial and could not have discovered it before trial by exercising diligence, that the evidence is so material that it would probably result in a different outcome in a new trial, and that it is not cumulative or merely impeaching of a witness' credibility. *State v. Williams,* 652 S.W.2d 102, 114 (Mo. banc 1983). The circuit court is vested with wide discretion in ruling on motions for new trials based on newly discovered evidence.
>
> The circuit court did not err. First, although the Burnses argue that this evidence was discovered after the trial, they make no showing that it could not have been discovered before trial by exercising due diligence. Second, Comstock's testimony is cumulative because Marsha Burns testified that she had told the children to lie. Third, it was impeaching of the credibility of the

children who repeatedly testified that the abuse had occurred.

*State v. Burns*, WD 59797, slip op. at 10 (June 11,2002) (unpublished memorandum not reported in S.W.3d).

Thus, even had Burns' appellate attorney distinguished between the availability of the evidence concerning Comstock to Burns versus his wife in his brief, Burns still would not have prevailed. His claim also failed due to the cumulative and impeaching nature of Comstock's testimony.[4]

Burns also asserts that his trial attorney's representation was ineffective for not investigating and presenting Comstock's testimony as a witness at trial. Although Burns admits that his attorney was not aware of Comstock before trial, he contends that his attorney could have discovered her through a reasonably effective investigation. We disagree.

Again, to prevail on an ineffective assistance of counsel claim based upon inadequate investigation, Burns' burden was to show that his attorney knew or should have known of the Comstock's existence, that Comstock could have been located through reasonable investigation, that she would have testified when called, and that her testimony

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[4] Burns also attempts to relitigate the issue of whether or not Comstock's testimony was merely cumulative and impeaching. Such an attack is not appropriate in a post-conviction motion. *Boyd v. State*, 86 S.W.3d 153,159, (Mo. App. 2002). Moreover, Burns did not present this claim to the circuit court in his Rule 29.15 motion. He is, therefore, procedurally barred from raising this claim of error here. *Barnett*, 103 S.W.3d at 773; Rule 29.15(d). He also did not raise this issue in his point relied on. We review those issues raised in the points relied on only. *Helmig*, 42 S.W.3d at 666.

would have provided Burns with a viable defense. *Crooks,* 131 S.W.3d at 410.

Because Burns' attorney was unaware of Comstock as a potential witness, he cannot be deemed ineffective for not finding her and calling her as a witness. An attorney cannot be expected to find a witness of whom they are unaware or have no basis for knowing exist. *State* v. *Stewart,* 859 S.W.2d 913,918 (Mo. App. 1993). Burns did not know who Comstock was until after his trial, and he had never seen her until she testified at the hearing on the motion for new trial.

Moreover, as we previously noted, this court held in Burns' direct appeal, in considering Burns' contention that the circuit court erred in denying his motion for new trial based upon Comstock's newly discovered testimony, that Comstock's testimony was merely cumulative to the testimony of Burns' wife and impeaching of the credibility of the children. "Failing to present cumulative evidence is not ineffective assistance of counsel." *State v. Johnston,* 957 S.W.2d 734, 755 (Mo. banc 1997), *cert. denied,* 522 U.S. 1150 (1998). Further, "witnesses who merely impeach the State's witnesses do not provide a movant with a defense to a charged crime." *Webster* v. *State,* 837 S.W.2d 585, 588 (Mo. App. 1992).

Burns also claims that his trial attorney's representation was ineffective because he did not present evidence at the motion for new trial hearing that Burns could not have reasonably discovered Comstock's testimony earlier. Burns asserts that in the direct appeal this court found that Burns made no showing that Comstock's testimony could not have been discovered before trial by exercising due diligence. He contends, therefore, that his attorney was ineffective for not satisfying the due diligence element of the newly-discovered evidence standard. We disagree.

As we concluded in his direct appeal, to obtain a new trial based upon newly-discovered evidence, Burns had to establish that he learned of the evidence only after the trial and could not have discovered it before trial by exercising diligence, that the evidence is so material that it would probably result in a different outcome in a new trial, and that it is not cumulative or merely impeaching of a witness' credibility. *State* v. *Williams,* 652 S.W.2d 102, 114 (Mo. banc 1983). As noted previously, even had Burns established that he could not have learned about Comstock's testimony before trial, he still failed to establish that the testimony was not cumulative or merely impeaching of a witness' credibility.

Burns also asserts that his trial attorney's representation was ineffective because the attorney did not object to Chris Hammontree's rebuttal testimony offered at the hearing on the motion for new trial as a violation of discovery rules. The state relied on Hammontree's testimony to discredit Comstock at the hearing on the motion for new trial.

Burns asserts that, pursuant to Rule 25.03, the state should have disclosed Hammontree's name and address to him before the hearing on the motion for new trial. Rule 25.03 says:

> (A) Except as otherwise provided in these Rules as to protective orders, the state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information within its possession or control designated in said request:
>
> (1) The names and last known addresses of persons whom the state intends

> to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements[.]"

"It is firmly established," however, "that a witness may be called in rebuttal who has not previously been disclosed." *State* v. *Collis,* 849 S.W.2d 660, 665 (Mo. App. 1993).[5] Thus, even had Burns' attorney objected to Hammontree's testimony as a violation of Rule 25.03, the objection would have been without merit and overruled.

Next, Burns asserts that his trial attorney's representation was ineffective because the attorney did not call his cousin, Ray Smith, as a witness. Burns asserts that Smith would have testified about his having sex with Burns' wife, which would have corroborated the testimony of Burns' wife that she was worried about Burns' reaction to her misconduct with Smith and that is why she fabricated the abuse story.

Again, to establish ineffective assistance of counsel for failure to call a witness, Burns' burden was to show that the decision involved something other than reasonable trial strategy, that Smith could have been located through reasonable investigation, that he would have testified when called, and that his testimony would have provided Burns with a viable defense. *Worthington,* 166 S.W.3d at 577. Moreover, selection of witnesses is a question of trial strategy, and as such is "virtually unchallengeable." *Id.*

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[5]Burns asserts that, because Hammontree's testimony was presented at a hearing on a motion for new trial, he cannot be considered a rebuttal witness. Burns, however, fails to cite any authority in support of this contention, and we are not persuaded. The state clearly called Hammontree as a witness on the motion for new trial to rebut Comstock's testimony.

Burns' attorney testified at the evidentiary hearing that he did not present Smith as a witness at trial because he was "somewhat of a loose cannon." Burns' attorney said that he was fearful of opening Smith up to damaging cross-examination and that he felt that he could get the benefits of Smith's information in through other witnesses, without taking the risks associated with calling Smith as a witness. "An attorney's deliberate failure to call a witness whom the attorney fears might hurt [his] client's case is a proper strategic and tactical decision that cannot constitute ineffective assistance of counsel." *State* v. *Williams,* 853 S.W.2d 371, 377 (Mo. App. 1993). Given the attorney's concerns about Smith, his decision not to call Smith as a witness was reasonable trial strategy.

Moreover, to be entitled to relief on a claim of ineffective assistance for failure to call a witness, Burns had to establish that the witness would have provided him a viable defense. *Worthington,* 166 S.W.3d at 577. Burns never alleges, much less demonstrates that anything Smith had to say would have provided him a viable defense. Burns merely alleges that Smith's testimony "would have corroborated that of Mr. and Mrs. Burns on a fact central to counsel's theory of the case-that Mrs. Burns was worried about Mr. Burns' reaction to her sexual misconduct with Ray Smith." Because Smith's testimony would not have provided Burns with a viable defense, Burns cannot demonstrate prejudice from counsel's failure to call Smith as a witness.

In his next point, Burns contends that his attorney's representation was ineffective because he did not present the complete school records of Burns' children. He asserts that, "[h]ad trial counsel obtained and reviewed the additional records presented at the evidentiary hearing, he would have learned more about the children and more about his client."

When asked at the evidentiary hearing whether he considered obtaining the school records of the children, Burns' attorney said:

> Yes. I think early on I had [Burns]—or I don't know if it was [Burns or his wife], but I had their grade cards which we did introduce. And actually, the comments on the grade cards showed that especially Erica was well-adjusted, good student. So the things that we wanted them to say, I think we—we had in evidence. And so to that extent, I did have the records. I think [Burns] indicated those were all the records that he had.

When asked if he made a particular strategic decision not to obtain the full records in addition to the grade cards, Burns' attorney responded, "I didn't think it was necessary." Indeed, the additional school records would have been merely cumulative to the evidence already submitted. "[T]he failure to present cumulative evidence generally does not constitute ineffective assistance of counsel." *Wainwright* v. *State,* 143 S.W.3d 681, 688 (Mo. App. 2004); *see also Storey v. State,* 175 S.W.3d 116, 139 (Mo. banc 2005).

Burns also asserts that that his attorney's representation was ineffective because the attorney did not object to the written statement that Burns' wife provided to the police which discussed the sexual practices of Burns and his wife. Burns asserts this evidence was irrelevant and highly prejudicial.

Burns' attorney testified at the evidentiary hearing that the sexual activities between Burns and his wife, although not directly related to the sexual abuse of the children, "were a pretty integral part of the case" and "intertwined" with the case. He said that he wanted to deal

with the Burnses' sex life right up front rather than allowing the state to have a chance to exploit it to its benefit. He also said that, as a part of a joint defense with Burns' wife, they were seeking to establish that Burns' wife fabricated all the allegations against her husband and that the written statement of Burns' wife was an example of that fabrication. At trial, Burns' wife testified that all the sexual practices that she claimed in her statement that her husband forced her to do actually occurred but she testified that she willingly participated in them. Burns' attorney testified that he was trying to point to the true parts of the story versus the false parts to bolster the testimony of Burns' wife. Because counsel's decision not to object to the written statement of Burns' wife was reasonable trial strategy, Burns' contention that his trial counsel was ineffective is without merit. *Storey,* 175 S.W.3d at 128.

In his next point, Burns asserts that his trial attorney's representation was ineffective because he did not object when he was informed by the Burnses and Burns' sister that some jurors were sleeping during the trial. At the evidentiary hearing, Burns' trial counsel said he did recall anyone's telling him that some of the jurors were sleeping during trial. He said typically when that occurs he would approach the bench and ask for a break. Although the Burnses and Burns' sister said that they all observed jurors sleeping during the trial and that they informed Burns' attorney, the circuit court found that Burns did not present credible evidence that a juror was sleeping during trial. We defer to the circuit court's determination of credibility. *Williams,* 111 S.W.3d at 563. "The [circuit] court's choice of trial counsel's testimony over [Burns'] will not be disturbed on appeal." *Id.*

Burns also contends that his trial attorney's representation was ineffective because the attorney changed the theory of the case on the eve of trial to a theory not supported by the evidence. Burns claims that his attorney

changed his theory of defense from emphasizing that Burns was a good father to emphasizing that Burns was a strict and unsympathetic father.

According to Burns' attorney:

> [T]alking in terms of [Burns] being strict and the-the head of the household [and] that [he] was unable to express his emotion to the kids, [t]hose are all things that I really was thinking about from day one. So I don't know when I would have changed or when anyone would have thought I would have changed as far as what I thought I had to portray to that jury. I had to explain why these children would say something false about their dad. And one of the other areas that I mentioned, this area, is that [Burns] was strict, and he loved them but sometimes couldn't tell them that. And—and when it was punishment time, it was [Burns.] I don't think I ever wavered from that from day one so I don't-I don't know how to respond to that other than to say that I don't agree that I changed on the eve of trial my—my defense strategy in this case.

Although Burns and his mother testified at the evidentiary hearing that Burns' trial attorney changed his strategy of the case the evening before trial, the circuit court found the testimony of Burns' trial attorney credible and specifically found Burns' and his mother's testimony not credible. Again, we defer to the circuit court's determination of credibility, and we will not disturb the circuit court's determination that trial counsel's testimony was more credible than Burns' and his mother's testimony. *Id.*

Moreover, the theory advance at trial was reasonable and supported by the evidence and provided a plausible explanation as to why the children would make allegedly false claims against their father. To present the alternative theory that Burns suggests-that he was a good father struggling with a mentally ill wife-would have undermined his defense that the children were lying. Burns' alternative theory provides no plausible explanation as to why the kids would continue with the lies about someone who was allegedly a "good father."

In his next point, Burns asserts that his trial attorney was ineffective when he presented a closing argument which Burns claims ignored significant evidence of a prior pattern of false allegations by his wife and which failed to present a coherent theory of the case. "The allegation that counsel gave an ineffective closing argument is a matter of trial strategy which does not provide a basis for post-conviction relief." *State* v. *Hamilton,* 791 S.W.2d 789,797 (Mo. App. 1990); *see also Teaster* v. *State,* 29 S.W.3d 858, 860 (Mo. App. 2000).

Burns' final point is a "catch-all." He asserts that the cumulative effect of all counsel's errors prejudiced him. We disagree. "If counsel's conduct is not constitutionally ineffective in any individual instance, counsel cannot be held ineffective on the whole." *State* v. *Brooks,* 960 S.W.2d 479,500 (Mo. banc 1997), *cert. denied,* 524 U.S. 957 (1998). Because we found no errors in regard to Burns' claims, his assertion of cumulative error must also be denied.

We, therefore, affirm the circuit court's judgment.

IN THE CIRCUIT COURT
OF PLATTE COUNTY, MISSOURI

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| ROBERT L. BURNS, Sr. | § | |
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| Movant, | § | |
| | § | |
| vs. | § | Case No. 02CV84922 |
| | § | |
| STATE OF MISSOURI | § | |
| | § | |
| Respondent | § | |

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

On January 14 and 24, 2005, movant appeared in person and through counsel, Elizabeth Unger Carlyle. The State of Missouri appeared through Mark L. Gibson and Matthew P. Wolesky, Assistant Prosecuting Attorneys for Platte County, The parties announced ready for hearing before the Honorable Owens Lee Hull, Jr., Circuit Judge - Division II of the Circuit Court of Platte County, Missouri. Movant adduced evidence through himself, his mother (Gina Fox), his sisters and her daughter (Angela Bustamonte, Rhonda Jones and Regina Jones), his cousins (Ray Smith), several co-workers of movant (Connie Sherman, Don Smith, several family friends (Jeff and Kathy Ramseier), Renea Comstock, Chris Hammondtree, Shawn Couch. Movant also asked the Court to take judicial notice of the underlying trial file and transcript of the trial—Case No. 99CR82013 as well as the exhibits admitted during the course of the trial. Movant also admitted the unpublished opinion in movant's direct appeal—*State of Missouri v. Robert Burns, Sr.*, WD59797.

Respondent presented evidence from movant's trial counsel F.A. 'Al' White, Kevin Locke, who was counsel for his wife and co-defendant, Marsha Burns and movant's appellate counsel, David Kelley. Argument was heard and the matter was taken under advisement.

Now on this 18th day of April, 2005, the Court takes up this matter and enters the following order.

## FINDINGS OF FACT

1. Movant, Robert Burns was convicted following a jury trial in Case No. 99CR82013 for the offenses of statutory sodomy (2 counts), child molestation in the first degree (2 counts) , sexual misconduct involving a child (2 counts) and statutory rape. Movant was found guilty by a jury which recommended sentences of 40 years on each count of statutory sodomy, 40 years for statutory rape, 5 years on each sexual misconduct charge and 7 years for each child molestation charge.

2. On March 21,2001, this Court sentenced movant to a total of 120 years imprisonment, running each counts of the statutory sodomy cases and the statutory rape charge consecutively and running the child molestation and sexual misconduct concurrently with the other three previously listed counts.

3. Movant filed an appeal of his conviction in the Missouri Court of Appeals Western District, and on June 11,2002, movant's conviction was affirmed.

4. On November 18, 2002, movant timely filed his pro se motion for post conviction relief and on February 18, 2003, movant, through counsel, timely filed an amended and second amended motion for post-conviction relief.

5. On March 20,2003, the State filed its Suggestions in Opposition to Movant's Amended Motion.

6. Movant was represented by F.A. 'Al' White during all pre-trial matters, the jury trial, the sentencing hearing and the appeal.[10]

7. Movant has not filed any other motions to vacate, petitions for habeas corpus or petitions for certiorari in this or any other court, challenging his conviction or sentence in this case.

8. None of the grounds for relief set forth in movant's motion have been previously presented to this or any other court - state or federal, in any petition, motion or application.

9. In his amended motion, movant presented 30 claims of ineffective assistance of trial counsel and appellate counsel - claims a through dd.

10. During the hearing - movant did not present evidence on several of his claims in his motion - those being claims F, H, I, J, 0, the second part of claim S, T, U, X, CC and DD. Since movant did not present evidence on these claims, he is deemed to have abandoned and has waived seeking any relief on these allegations.

11. Movant, in his motions, alleges that his constitutional rights were violated in the underlying criminal case because of the following:

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[10] Respondent notes that the record indicated that while Mr. White was counsel of record who signed the brief on appeal filed by movant, the brief was researched and completed by Charles Rogers, Cheryl Pilate and David Kelley, members of the Kansas City law firm of Wyrsch, Hobbes and Mirakian.

a. Claim a - During the jury selection, movant contended that one of the jurors was looking at movant in a hostile manner and movant asked trial counsel to use a preemptory strike to remove the juror.

b. Claim b - During the trial, movant contended that some of the jurors were sleeping.

c. Claim c - Movant contended trial counsel was ineffective for not calling Ray Smith to testify at trial. Smith would have testified as to some 'sexual conflict' between movant and his wife.

d. Claim d - Movant contended that trial counsel was ineffective for failing to introduce DFS records about previous allegations of abuse involving the movant's children.

e. Claim e - Movant contended that trial counsel was ineffective in not calling Robert Jr.' s and Erica's teachers to testify at trial - that the children were doing well in school - apparently to indicate that since they were doing well at school - everything at home must be alright, and no sexual abuse was occurring.

f. Claim f - Waived and Abandoned.

g. Claim g - Movant contended that Connie Sherman, a co-worker should have testified at trial and trial counsel was ineffective in not calling her. Movant alleges that Connie Sherman observed movant and his children at company functions and saw an apparent 'normal' family.

h. Claim h - Waived and Abandoned.

i. Claim i-Waived and Abandoned.

j. Claim j - Waived and Abandoned.

k. Claim k - Movant contended that trial counsel changed his trial strategy on the eve of trial against the wishes of movant. Movant contends that rather than presenting him as a good and caring father with a wife with troubles he presented him as a strict disciplinarian and taskmaster.

l. Claim l – Movant contended that trial counsel was ineffective for not objecting to a videotape statement of movant's children in that they were told that their parents would receive probation.

m. Claim m - Movant contended that trial counsel should have objected to keep out his co-defendant's thirteen page statement to the police detailing the sexual acts charges against movant.

n. Claim n - Movant contended that trial counsel failed to call Angela Bustamonte, his co-defendant's sister, as a witness at trial. Movant contends that Bustamonte would have testified that after finding out that movant had molested his daughter, she went to Erica to tell her that it was not her fault and Erica looked 'stunned and surprised' and acted as if she didn't know what Bustamonte was talking about.

o. Claim o - Waived and abandoned.

p. Claim p - Movant contended that trial counsel should have called Don Smith to testify. Don Smith was a co-worker with movant and Smith would have indicated that he saw the Burns family

at work functions and gatherings and they appeared to have a normal family relationship.

q. Claim q - Movant contends that trial counsel should have called Rhonda Jones and Regina Jones to testify at trial Rhonda Jones was Marsha Burns' sister and Regina Jones was Rhonda's daughter. Rhonda Jones would have testified that Erica had talked to Rhonda about Marsha's depression and that it concerned her and Regina would have testified that she stayed with her cousin Erica and nothing seemed out of the ordinary with Erica.

r. Claim r - Movant contended that trial counsel was ineffective in failing to call and investigate Renea Comstock at trial. Movant contends that Comstock, who lived for period with Marsha Burns at a woman's shelter in southwestern Missouri would have testified that she heard Marsha Burns coaching the children and telling them to lie.

s. Claim s - Movant contended that trial counsel was ineffective in failing to call Shawn Couch as a witness at trial. Couch, who at the time of the trial, would have been four or five, lived with the Burns for a summer. Couch is a relative of the Burns.

t. Claim t - Waived and abandoned.

u. Claim u - Waived and abandoned.

v. Claim v - Movant contended that trial counsel was ineffective in failing to call Jeff and Kathy Ramseier as witnesses at trial. The Ramseier's would have testified that they were family friends

of movant and they did not observe anything inappropriate in the way movant or his wife dealt with their children.

w. Claim w - Movant contends that trial counsel gave a faulty closing argument - not focusing on inconsistencies during testimony during the trial.

x. Claim x - Waived and abandoned.

y. Movant contends that trial counsel should have sought a continuance when Chris Hammondtree, an employee of the Kansas City Star testified at the motion for new trial regarding subscriptions of the Kansas City Star in the Springfield, Missouri area. This is where Renea Comstock claims she read the article about movant and Marsha Burns convictions for the offenses which they were charged.

z. Claim z - Movant contended that trial counsel should have informed the court that he did not know what Renea Comstock had to say in the motion for new trial based upon the newly discovered evidence of what she purportedly had to say - that she heard Marsha Burns telling her two children to lie.. That movant had no way of knowing who she was since she was an acquaintance of his wife, Marsha Burns.

aa. Claim aa - Movant contended that appellate counsel did not allege as plain error review on appeal the fact no objection was made at trial to the prerecorded statements made by movant's children that were played during the trial. Movant claims that appellate counsel was ineffective for failing to raise this issue as a matter of plain error.

bb. Claim bb - Movant contends that appellate counsel was ineffective for failing to differentiate the claims of movant and his wife. That certain claims were better presented for issues pertaining to movant – others were better suited for those of his wife.

cc. Claim cc - Waived and abandoned.

dd. Claim dd - Waived and abandoned.

12. During the evidentiary hearing, movant's trial counsel testified, as well as his wife's counsel. Both movant's counsel, Mr. White, and his wife's counsel, Mr. Locke testified that they met extensively with each of their respective clients.

13. Mr. White testified that he had numerous meetings with movant to discuss the case and plan their trial strategy. Sometimes these meetings were alone other times Marsha Burns was present. Mr. Locke testified to the same – that he met with his client, and that he also did meet with his client along with the movant.

14. Mr. White indicated that movant made it clear to him during the trial preparation that the way the trial would be conducted would have to be such that it would be a joint defense - that trial counsel should not do anything that would prejudice or damage his wife White testified that he told movant that he could present evidence and present a defense that would be favorable to him but that would be harmful to Marsha Burns if that is what he wanted. White testified that movant made it clear to him that he should not do anything that would harm his wife's defense.

15. Mr. White also testified that he asked movant for all the names of people that could help his case.

16. White also indicated that evidence he presented and didn't present were reasons of trial strategy. Calling 'character' witnesses in this case would not be helpful given the fact they would be subject to scathing cross-examination by. the State on the unconventional sex habits of the Burns'. None of these 'character' witnesses would have been privy to what went on in the Burns' bedroom or their home. Counsel saw this would be the case, and opted not to present character evidence.

17. Mr. White testified that he did not remember Mr. Burns asking that he strike juror O'Mara through use of a preemptory challenge, and Mr. White had no memory of jurors sleeping nor of being told about such a situation. Mr. White testified that his trial theory was that Mr. Burns was innocent, though the letter written by Mrs. Burns created critical problems regarding this defense. He further testified that no objection was made to the videotaped statements of the children because he thought such tapes were admissible, and their admission helped the defense and were illustrative of the defense's expert testimony regarding 'parental alienation syndrome'.

18. The testimony of Mr. White, Mr. David Kelly, and Cheryl Pilate in this hearing, reflect that Mr. Kelly and Ms. Pilate worked together after getting Mr. White's permission to meet with Robert Burns on the consolidated appellate brief presented on behalf of the defendants to the Western District Court of Appeals.

Mr. Kelly met with Mr. Rogers, Mr. Locke, and Mr. White after the trial and the intent was to file a consolidated joint brief with the Court of Appeals. Mr. Kelly met with both Mr. and Mrs. Burns in prison as part

of the brief preparation of the appellate brief. The credible evidence adduced herein reflects that both Mr. and Mrs. Burns wanted to proceed with a joint appeal, though technically, a brief was filed on behalf of each.

19. Any findings of fact set forth herein deemed to be Conclusions of Law are considered as such.

Conclusions of Law

1. The Court finds that it has jurisdiction over the parties in this cause.

2. Movant's pro se motion was timely filed and properly verified pursuant to Rule 29.15.

3. In order to prevail on a claim of ineffective assistance of counsel, movant has the burden of proving his or her grounds for relief by a preponderance of the evidence. Rule 29.15.

4. Movant bears a heavy burden to show ineffective assistance of counsel. *State v. Taylor*, 778 S.W.2d 276,280 (Mo.App., W.D. 1989). To establish a claim of ineffective assistance of counsel, movant must demonstrate two things - 1) movant must show that his counsel's performance was deficient; and 2) that counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1987). To prove deficient performance, movant must show counsel's acts or omissions were outside the range of professionally competent assistance. *Id.* In determining whether counsel's performance was deficient, the inquiry must be whether, in light of all the circumstances, counsel's assistance was reasonable. *State v. Aziz*, 844 S.W.2d 531,536 (Mo.App., W.D. 1992). In order to show prejudice, the movant must show that there was a

reasonable probability that, but for the errors by movant's attorney, the fact finder would have had a reasonable doubt respecting movant's guilty. *Id.* Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance. *Id.* at 689.

5. Based upon the evidentiary hearing and examination of the complete trial record and the decision affirming movant's conviction, this Court finds and concludes as follows:

    a. Movant did not present evidence on several of his claims during the evidentiary hearing. Since he did not present evidence on these claims he is deemed to have waived and abandoned these claims in his motion. These claims are **F, H, I, J, O**, the second part of claim **S, T, U, X, CC** and **DD.**

    b. Movant's claim that trial counsel was ineffective in failing to strike juror Roger O'Mara is without merit. Movant's own allegation is that this juror 'appeared' to be hostile. Trial counsel testified that he did not note any hostility towards movant from this potential juror and that he wanted to use one of his remaining strikes on a juror that trial counsel knew and did not have a good relationship with. Trial counsel testified that since he did not have a good relationship with this potential juror, he wanted him taken off the panel. Normally, improper jury selection is regarded as trial court error that is not a cognizable claim under Rule 29.15. *State v. Pierce,* 927 S.W.2d 374, 377-378 (Mo.App. 1996). Nonetheless, improper jury selection may be advanced for the first time in a post-conviction relief proceeding if ,the defendant shows that he had no knowledge of the improper

jury selection process until after his trial. Rule 29.15, citing *Smith v. State*, 684 S.W.2d 520 (Mo.App., 1984); *State v. Colbert*, 949 S.W.2d 932 (Mo.App., 1997). Trial counsel's actions were logical and effective, as he indicated to movant the reasons why the juror he struck needed to be taken off the jury panel. *Hightower v. State*, 43 S.W.3d 472 (Mo.App., S.D. 2001). Movant's point is without merit and is denied.

c. Movant's claim that jurors were sleeping are not supported by evidence presented during the evidentiary hearing, nor in the record from the trial. Trial counsel, and Mr. Locke, for that matter, both testified that they did not observe any jurors sleeping during the presentation of evidence. The record during the trial does not support this claim either, as the Court, nor attorneys for the State did not notice any jurors sleeping during the trial. The mere fact a juror slept during the trial does not entitle Movant to relief, he must show that he was prejudiced by the juror's sleeping. *State v. Fritz*, 913 S.W.2d 941,945 (Mo.App., W.D. 1996); *Vann v. State*, 26 S.W.3d 377 (Mo.App., S.D. 2000). Movant has not presented credible evidence that a juror was sleeping during the trial and has not demonstrated any prejudice in any event. Movant's claim is without merit and is denied.

d. Movant's claim that trial counsel was ineffective because he failed to . call Ray Smith as a witness during trial. Trial counsel indicated he had spoken with movant about calling Ray Smith and for trial strategy reasons, decided against calling Smith. Trial counsel indicated that he had read a letter from Smith and based upon that he found Smith would be a 'loose cannon'. Trial counsel also

indicated that Smith would be subject to some strong cross-examination by the State as in the letter, Smith detailed having consensual three-way sexual encounters with the movant and his wife. Trial counsel testified that he was trying to do all he could do to limit the jury hearing about movant and his wife's non-typical sexual habits. To prevail on a claim for failing to call a witness, the movant must establish that there is a reasonable probability that the testimony would have caused the jury to acquit the movant. *State v. Starks,* 856 S.W.2d 334 (Mo. banc 1993). Most importantly, it is well settled that selection of witnesses and the introduction of evidence are questions of trial strategy. *Leisure v. State*, 828 S.W.2d 875 (Mo. banc 1992). To prove ineffectiveness in failing to call a witness to testify, a defendant must establish that the attorney's failure to call the witness was something other than reasonable trial strategy. *State v. Boyd,* 842 S.W.2d 899, 905 (Mo.App. 1992). A decision not to call a witness is virtually unchallengeable. *Id.* Trial counsel's actions were reasonable and sound trial strategy. Movant's point is without merit.

e. Movant's claim that trial counsel was ineffective in failing to introduce school records of their children. Trial counsel and Mr. Locke testified that they introduced several report cards of both Erica and Robert, Jr. These report cards showed both to be either straight A students or close to being straight A students. Additionally, the report cards also had sections for teacher comments and other notations about the progress of the children. It is well settled that selection of witnesses and the introduction of evidence are questions of trial strategy. *Leisure v. State,* 828 S.W.2d 875 (Mo.

banc 1992).[11] This claim is without merit and should be denied.

f. Movant's claim that trial counsel was ineffective in failing to call Connie Sherman as a witness is also without merit. Connie Sherman was a co-worker with movant. Trial counsel indicated that for reasons of trial strategy he was not going to call any' character' witnesses. Trial counsel knew and testified at the evidentiary hearing that these witnesses did not know anything about the bedroom life of movant and his wife and they would be subject to rigorous cross-examination from the State. Sherman and the other 'character' witnesses that testified at the evidentiary hearing all testified that they knew nothing about the private life of movant and his wife. As mentioned previously, to prevail on a claim for failing to call a witness, the movant must establish that there is a reasonable probability that the testimony would have caused the jury to acquit the movant. *State v. Starks,* 856 S.W.2d ,334 (Mo. banc 1993). Most importantly, it is well settled that selection of witnesses and the introduction of evidence are questions of trial strategy. *Leisure v. State,* 828 S.W.2d 875 (Mo. banc 1992). To prove ineffectiveness in failing to call a witness to testify, a defendant must establish that the attorney's failure to call the witness was something other than reasonable trial strategy. *State v. Boyd,*_842 S.W.2d 899, 905 (Mo.App. 1992). A decision not to call a witness is virtually

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[11] Respondent notes that a portion of this claim, that trial counsel failed to call any teachers to testify at trial, was not supported by any evidence at the evidentiary hearing. Movant admits this as much in his suggestions. That portion of the claim should be deemed waived and abandoned.

unchallengeable. *Id.*

Additionally, this witness would merely be a character witness. Character witnesses do not provide a viable defense, no matter how well they testify, so the failure to call them provides no basis to support a finding of ineffective assistance of counsel. *State v. Broseman*, 947 S.W.2d 520 (Mo.App., W.D. 1997). Movant's claim is without merit is should be denied.

g. Movant contends that trial counsel was ineffective in that he changed his strategy of the case the evening before trial. Movant testified to that as well as his mother, Gina Fox. Trial counsel testified that no such thing happened. Trial counsel testified that he had met with movant numerous times, that he had prepared movant for testifying in court, and was ready and prepared to try the case. The court finds the testimony of trial counsel credible and movant and his mother not credible. Counsel's strategy was sound and competent. There is a presumption that any challenged action was sound trial strategy and that counsel rendered adequate assistance and made all significant decisions in the exercise of professional judgment. *Kluck v. State*, 30 S.W.3d 872 (Mo.App. S.D. 2000).

h. Movant contends that trial counsel was ineffective in failing to object to the out of court videotaped statements. Trial counsel and Mr. Locke questioned both children in the videotape and they both indicated that the wanted portions of the tape to come in as well. In any event, the tapes were admissible evidence. Failure to object to admissible evidence is not ineffective assistance of

counsel. *State v. Parker*, 886 S.W.2d 908, 932 (Mo. banc 1992).

In any event, the transcript shows ,that this was a misstatement of the facts of this case. It was Mr. Locke who initiated an intimidating line of questioning to the children, but was an attempt to force a change of their testimony.

Mr. Locke: And if they believe you, if they believe that really happened, then the jury has, they have, they are required - you know what required means?

Robert Jr.: Yes

Mr. Locke: It means they can't say, 'We don't want to do it'. They have to do it. They have to send your Mom to prison for at least 10 years.

Ms. Ketchmark: I'm going to object. That's a recommendation to the Judge. The judge will be sentencing these folks, and he has the ability to give probation. That's an incorrect statement of the law. I've seen a judge give folks probation when a jury recommends the penitentiary, and I'm going to object to that and ask that you go on to another line of questioning and that we talk to the judge.

Mr. Locke: I don't intend on doing that. I intend to make this young man aware exactly of what his parents are facing.

Ms. Ketchmark: Okay. I'm not opposed to you telling him what the range of punishment is as long as you accurately tell him. It is not -

> you know that folks are convicted of B felonies can still get probation, A felonies and still get probation. And for you to wrongly say there is no option other than prison is incorrect, and I don't think that's what this deposition is all about, and they may very well not be eligible for probation, but that's just improper at this point, and we need to take a break and visit with the judge.

(Tr. 390-91, citing deposition p. 21).

In any event, the trial prosecutor went out of her way to make sure that any question in this regard was resolved.

> Ms. Ketchmark: Do you know your mom would like you to tell the jury these sexual things did not happen to you.
>
> Erica: I'm sure she would probably like me to say that.
>
> Ms. Ketchmark: Did they happen to you?
>
> Erica: Yes
>
> Ms. Ketchmark: Do you know your parents probably could go to prison for life if they're convicted?
>
> Erica: Yes

(Tr. 335).

i. Movant contends that trial counsel was ineffective because he failed to object to the portions of the pretrial statement of Ms. Burns which referred to unconventional sexual acts between movant and

Ms. Burns. These statements were admissible as defendant's statements, whether introduced by the State or by the defense. Counsel does not need to make nonmeritorious objections. Since the statements would have come in anyways, it was sound trial strategy by defense counsel to pre-empt their admission by the state and address the statements in his opening statement and not object to their introduction. Counsel testified as to this fact – that he did this as a matter of trial strategy. Failure to object to admissible evidence is not ineffective assistance of counsel. State v. Parker, 886 S.W.2d 908, 932 (Mo. banc 1992). Movant's point is without merit and is denied.

j. Movant contends that trial counsel was ineffective in failing to call Angela Bustamonte as a witness at trial. Trial counsel indicated that movant did not inform his of this witness and what evidence they would have presented would not have helped acquit the movant. Again, they would have been character evidence or evidence that would have been used to merely impeach the State's witnesses.. To prevail on a claim for failing to call a witness, the movant must establish that there is a reasonable probability that the testimony would have caused the jury to acquit the movant. *State v. Starks*, 856 S.W.2d 334 (Mo. banc 1993). Most importantly, it is well settled that selection of witnesses and the introduction of evidence are questions of trial strategy. *Leisure v. State*, 828 S.W.2d 875 (Mo. banc 1992). Witnesses who merely impeach the State's witnesses do not provide movant with a defense to a charged crime. *State v. Mills*, 872 S.W.2d 875, 881 (Mo.App., 1994). To prove ineffectiveness in failing to call a witness to testify, a defendant must establish that

the attorney's failure to call the witness was something other than reasonable trial strategy. *State v. Boyd,* 842 S.W.2d 899, 905 (Mo.App. 1992). A decision not to call a witness is virtually unchallengeable. *Id.*

k. Movant claims- that trial counsel was ineffective in failing to call Don Smith, a co-worker of movant. This argument is meritless – *see previous paragraphs d and f, supra.*

l. Movant claims that trial counsel was ineffective in failing to call Rhonda and Regina Jones as witnesses. Again, they would have been character evidence or evidence that would have been used to merely impeach the State's witnesses.. To prevail on a claim for failing to call a witness, the movant must establish that there is a reasonable probability that the testimony would have caused the jury to acquit the movant. *State v. Starks,* 856 S.W.2d 334 (Mo. banc 1993). Most importantly, it is well settled that selection of witnesses and the introduction of evidence are questions of trial strategy. *Leisure v. State*, 828 S.W.2d 875 (Mo. banc 1992). Witnesses who merely impeach the State's witnesses do not provide movant with a defense to a charged crime. *State v. Mills,* 872 S.W.2d 875, 881 (Mo.App., 1994). To prove ineffectiveness in failing to call a witness to testify, a defendant must establish that the attorney's failure to call the witness was something other than reasonable trial strategy. *State v. Boyd*, 842 S.W.2d 899, 905 (Mo.App. 1992). A decision not to call a witness is virtually unchallengeable. *Id.*

Movant alleges that trial counsel was ineffective to investigate Renea Comstock as a witness. Trial counsel indicated, as well as Mr. Locke, that movant or his wife did not mention anything about Renea Comstock. Movant did not know where his wife went when she went to southwest Missouri to live at a shelter. Again, to prevail on a claim for failing to call a witness, the movant must establish that there is a reasonable probability that the testimony would have caused the jury to acquit the movant. *State v. Starks,* 856 S.W.2d 334 (Mo. banc 1993). Most importantly, it is well settled that selection of witnesses and the introduction of evidence are questions of trial strategy. *Leisure v. State,* 828 S.W.2d 875 (Mo. banc 1992). Witnesses who merely impeach the State's witnesses do not provide movant with a defense to a charged crime. *State v. Mills,* 872 S.W.2d 875, 881 (Mo.App., 1994). To prove ineffectiveness in failing to call a witness to testify, a defendant must establish that the attorney's failure to call the witness was something other than reasonable trial strategy. *State v. Boyd,* 842 S.W.2d 899, 905 (Mo.App. 1992). A decision not to call a witness is virtually unchallengeable. *Id.* Movant's claim is without merit and should be denied.

m. Movant claims that trial counsel should have called Shawn Couch who at the time would have been four or five when he lived with the Burns' at trial. Couch supposedly would have testified that he didn't see any improper sexual behavior. Besides the point of a four or five year old knowing what *any* type of sexual behavior is, whether it normal or abnormal, his name was not mentioned by movant to trial counsel This point is without merit - *see, paragraphs d and f, supra.*

n. Movant contends that counsel should have called Jeff and Kathy Ramseier during trial. Again, movant contends that these family friends would have said they observed nothing abnormal about the Burns family. Trial counsel testified that he was not informed about these witnesses, and in any event, since they were 'character' in nature, he would not have called them. Movant's point is without merit. - *see, paragraphs d and f, supra.*

o. Movant contends that trial counsel gave an ineffective closing argument. This point is without merit. An allegation that defense counsel gave an ineffective closing argument is a matter of trial strategy - issues regarding sound trial strategy do not provide a basis for postconviction relief. *Haddock v. State,* 75 S.W.2d 872 (Mo.App. W.D. 2002).

p. Movant contends that trial counsel was ineffective in failing to not seek a continuance when Chris Hammontree testified at the Motion for New Trial about subscriptions of the Kansas City Star in the Springfield area. This allegation of ineffectiveness goes to the purported testimony of Renea Comstock - that she read about the Burns' conviction in the paper and she had the so-called information about hearing Marsha Burns coaching her children to lie. Again, movant's contention is without merit. Movant must show that counsel was not only deficient, but that he was prejudiced by counsel's deficiency. Any evidence that would have been elicited by Comstock, even had she testified at trial, would have been cumulative and impeaching in nature. *See, State v. Burns - Unpublished* Opinion, p. 10. Movant did not meet his burden in seeking a new trial based upon this

purported evidence from Comstock. Movant suffered no prejudice because Hammondtree testified the way he did at the motion for new trial. Movant's point is without merit.

q. Movant contends that trial counsel was ineffective at the motion for new trial as it pertains to the testimony of Renea Comstock. Movant claims that although there was a 'joint defense' he could not have known all the witnesses his wife and co-defendant could have called. In any event, as stated in paragraph p, *supra,* the trial court was proper in not granting a new trial based upon the newly discovered testimony and evidence of Renea Comstock In order to obtain a new trial, a defendant must show: 1) the evidence has come to knowledge of the defendant since trial; 2) it was not owing to want of due diligence that it was discovered sooner; 3) the evidence was so material that it would probably produce a different outcome in a new trial; and 4) that it is not cumulative or merely impeaching the credibility of a witness. *See, State v. Burns* - Unpublished Opinion, p. 10, *citing State v. Williams,* 652 S.W.2d 102, 114 (Mo. banc 1983). The appellate court found that movant did not satisfy either the third or fourth prong of the test. *Burns memorandum opinion* at p. 10. Movant's point is without merit and should be denied.

r. Movant contends that appellate counsel did not include the issue about the prerecorded videotaped statements of the children. Trial counsel and Mr. Locke both testified that they believe there was no meritorious objection to admitting the tapes and they both in fact, wanted the tapes in for their own reasons. Appellate counsel (Mr. Kelley) indicated

that he met with movant while in prison to discuss the appeal. He wrote the brief. Mr. Kelley indicated that he did not feel that there was any error to begin with on this issue, that the videotapes would have come in properly, so this issue did not rise to the level of plain error, and he did not include it. To support a claim of ineffective assistance of appellate counsel, strong grounds must exist showing that counsel failed to assert a claim of error which would have required reversal had it been asserted and which was so obvious from the record that a competent and effective lawyer would have recognized it and asserted it. *Moss v. State*, 10 S.W.3d 508 (Mo. banc 2000) Mr. Kelley indicated that the point was meritless and did not rise to any error, let alone plain error. Counsel cannot be deemed ineffective for failing to raise meritless points on appeal. Movant's point is without merit.

s. Movant's last point is that appellate counsel did not properly raise the issue pertaining to the testimony of Renea Comstock in his brief. The same argument on this issue was set forth in paragraph q - that the testimony of Comstock did not meet the requirements for a new trial to be granted. *See Burns Memorandum opinion* p. 10. Movant's last point is without merit.

6. Movant herein has failed to demonstrate prejudice caused by counsel's alleged errors and has failed to establish that there was a reasonable probability that the outcome of the trial would have been different, but for counsel's errors. *Sidebottom v. State*, 781 S.W.2d 791 (Mo banc 1989). The credible evidence presented herein shows that Movant's counsel, during the pretrial process and during the trial, made certain strategic choices, having

investigated the law and facts in the underlying case, and said choices were based upon his professional judgment. *State v. Twenter,* 818 S.W.2d 628 (Mo banc 1991). Generally, the failure to object to certain evidence does not rise to the level of ineffective assistance of counsel unless movant has suffered a substantial deprivation of right to a fair trial and movant has not met his burden in this regard. *Williams v. State,* 783 S.W.2d 457, (Mo.App., 1990).

7. Any Conclusions of Law set forth herein deemed to be Findings of fact are considered as such.

WHEREFORE IT IS ORDERED AND ADJUDGED: That Movant, Robert L. Burns, Sr., Amended Motion to Vacate, Set Aside, or Correct Judgment or Sentence, filed 'February 18, 2003, is denied.

April 18, 2005
Date

/S/ Owens Lee Hull, Jr.
Owens Lee Hull, Jr.
Circuit Judge – Division II
Platte County, Missouri

**MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

**February 27, 2007**

**IMPORTANT NOTICE**

To: All Attorneys of Record

Re: ROBERT L BURNS, SR #1-56031 (29.15),
APPELLANT

vs.

STATE OF MISSOURI, RESPONDENT

WD65487

Please be advised that Appellant's Motion for Rehearing is **OVERRULED** and motion for transfer to Supreme Court is **DENIED.** See Rule 83.04

/S/ Terrence G. Lord

Terence G. Lord
Clerk

cc: ELIZABETH UNGER CARLYLE (866) 764-1249
SHAUN J MACKELPRANG (573) 751-5391

# IN THE SUPREME COURT OF MISSOURI

SC88381
WD65487

May Session 2007

Robert Burns, Sr.,
Appellant,

vs. (TRANSFER)

State of Missouri,
Respondent.

Now at this day, on consideration of the appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session, 2007, and on the 1st day of May, 2007, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 1st day of May, 2007.

/S/ Thomas F. Simon

_____Clerk

**In the**
**Missouri Court of Appeals**
**Western District**

| | | |
|---|---|---|
| STATE OF MISSOURI | § | |
| | § | |
| Respondent | § | |
| | § | WD 59797 |
| v. | § | |
| | § | Filed: June 2, 2002 |
| ROBERT L. BURNS, Sr. | § | |
| | § | |
| Appellant | § | |

MEMORANDUM[1]

## I. Sufficiency of Evidence Concerning Penetration

Robert Burns' and Marsha Burns'[2] first of five issues on appeal is that the circuit court erred by overruling their motion for judgment of acquittal at the close of the state's evidence and at the close of all of the evidence. They contend that the state's evidence was insufficient to sustain a conviction for statutory rape in the first degree because the state did not prove beyond a reasonable doubt that Marsha Burns caused her son's penis to penetrate her genitals.

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[1] This unpublished memorandum explains the rationale for the order affirming judgment and should not be cited in unrelated cases. Attach a copy to any motion to rehear or to transfer the case to the Supreme Court.

[2] Although Robert Burns and Marsha Burns appealed their convictions in separate cases before this court, they filed identical briefs for their appeals and asserted their contentions together. Hence, for the purposes of this memorandum, we refer to them in the plural form.

The Burnses argue, "Neither Marsha Burns nor Robert Burns, Sr. are guilty of the crime of statutory rape because the testimony and evidence presented at trial by the state did not prove beyond a reasonable doubt that Marsha Burns had sexual intercourse with Robert Burns, Jr. as required under the statute." They assert that the state did not prove "that penetration occurred between the genitals of the alleged victim Robert Burns, Jr. and defendant Marsha Burns[.]" We disagree.

The Burnses' son testified in response to the prosecutor's questions:

> Q. What happened?
>
> A. I was downstairs [at my house in Parkville] and my sister came and told me to--that my dad wanted me, so I came upstairs.
>
> Q. What did you do then?
>
> A. I knocked on the door and they said, "Come in," and I came in.
>
> Q. Where was your dad at?
>
> A. He was sitting in a chair in the corner.
>
> Q, And where was your mom at?
>
> A. I'm not really sure.
>
> Q. But was she in the room?
>
> A. Yes.
>
> Q. What did you do then?

A. My dad told me to pull down my pants.

Q. And did you do that?

A. Yes.

Q. .And what happened then?

A. Then he told me to lay on the bed.

Q. Okay. What happened after that?

A. Then my mom got on me.

Q. And when you say she got on you, did she have her clothes on?

A. No.

Q. And could you see her private part?

A. Yes.

Q. Could you see her private part where she ["]pees["]?

A. Yes.

Q. . . .Where did your mom put her private part?

A. On my private part.

Q. And when you say, "on," did your private part go inside of her private part?

A. I'm pretty sure it did.

Q. What happened after that, after you think your private part went inside of her?

A. And then she started moving up and down.

Q. How long did that last?

A. Maybe twenty—ten—fifteen seconds.

Q. After that was over, what happened?

A. I was told to pull my pants, put my clothes on, and leave the room.

During cross-examination, Robert Burns, Jr., testified:

Q. Now, I don't really want to embarrass you, Robert, but I'm going to have to ask you some other things. Your private, you know what I mean if say that your private gets stiff sometimes?

A. Yes.

Q, Okay. Was your private stiff the night that your mom got on top of you?

A. I think so.

Q, Do you remember when we tall<:ed the other day you said maybe it was, you're not sure?

A. Yeah.

Q. And is that the way it is today that maybe your private was stiff, you , just-you're not sure?

A. Yeah..

Q. Okay. And you told the jury here that-that you think that your private went inside your mom's private. Right?

A. Right.

Q, But I think you told us that you're not sure about that either. Right?

A. Right.

Q. Okay. So there's-if you're being really truthful about it, you would say that you don't know if your private went in your mom's private or not—do you?

A. Yes.

Q. But I think you told us that you're not sure about that either. Right?

A. Right.

Q. Okay, So there's-if you're being really truthful about it, you would say that you don't know if your private went in your mom's private or not, do you?

A. Yes.

The Burnses argue, "A critical review of Robert, Jr.'s testimony reveals that his ultimate admission at trial was that

he simply did not know whether or not his penis went inside of Marsha Burns) genitals." Their argument is wrong.

When reviewing the sufficiency of the evidence to sustain a conviction, we accept as true all evidence tending to prove a defendant's guilt, together with all reasonable inferences supporting the verdict, while disregarding evidence contrary to the verdict. *State v. O'Brien,* 857 S.W.2d 212, 215-16 (Mo. banc 1993). We must verify that the evidence against the defendant is indeed substantial that the defendant committed the crime beyond a reasonable doubt. *State v. Grim,* 854 S.W.2d 403) 405 (Mo. banc 1993). The resolution of conflicts in evidence and the determination of credibility of witnesses are matters for' the jury to consider and are not subject to review on appeal. *State* v. *Newberry,* 605 S.W.2d 117, 121 (Mo. 1980).

"A person commits the crime of statutory rape in the first degree if he has sexual intercourse with another person who is less than fourteen years old." Section 566.032.1.[3] Section 566.010(4) defines "sexual intercourse" as "any penetration, however slight, of the female sex organ by the male sex organ, whether or not an emission results."

The Burnses argue that the state's evidence did not establish even a slight penetration of their son's penis into Marsha Burns' "genitals." The Burnses established that the boy was uncertain as to whether his "private" penetrated his mother's "private." The boy was adamant, however that his mother put her "private part" on his and moved up and down on it. The law is clear that "penetration" includes a woman's vulva and external genitalia. *State* v. *Coffman,* 230 S.W.2d 761, 763 (Mo. 1950). From the boy's testimony, the jury had a strong basis for concluding that Marsha Burns caused, at a minimum, her son's penis to penetrate her vulva.

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[3] All citations to statutes refer to the 2000 Revised Statutes.

**II. Time Period of the Alleged Sodomy**

In their second point, the Burnses argue that the circuit court erred in overruling their motion for judgment of acquittal because the state's evidence was insufficient to prove that Marsha Burns had deviate sexual intercourse with her son during the time period specified in the indictment. The indictment accused her of having deviate sexual intercourse with her son, born on June 9, 1989, from March 19, 1996, through August 25, 1999. The Burnses argue:

> The only evidence at trial which came in with regard to this allegation came from Robert Jr.'s trial testimony. Robert Jr. testified at trial that his mother sucked his private when he was "six or seven" years old. .., That statement, coming from a boy the age of eleven at the time of trial, is itself simply not credible and should not be accorded any weight.
>
> However, given that Robert Jr. was born on June 9, 1989, he was six years old for over nine months before reaching the relevant time period which began on March 19, 1996. According to Robert Jr.'s testimony, the incident in question could have happened then during that nine months time and not during the relevant time period,

That the incident may have occurred before the stated time period in the information is irrelevant because "time is not of the essence in sex offense cases." *State* v. *Sexton,* 929 S.W.2d 909, 917 (Mo. App. 1996). In *Sexton,* we said, "[T]he state is not confined in its evidence to the precise date stated in the information, but may prove the offense to have been committed any day prior to the date of the information

and within the period of limitation." *Id.* As long as the evidence establishes that the alleged offense occurred within the relevant statute of limitations, the evidence is proper. *Id.*

The purpose of an information is "to give a defendant general notice of the charge against him," *State v. Barnard,* 820 S.W.2d 674, 680 (Mo, App. 1991). The information in this case did that. The Burnses' defense suffered no prejudice because of the stated time frame in the indictment because their defense was that they never committed the crime—not that they did not commit the crime on the specified date.

**III. Prosecutor's *Voir Dire***

The Burnses next complain that the circuit court permitted the prosecutor, over their objection, to ask these *voir dire* questions of the jury panel:

> The defendants are basically charged in the indictment with oral sex with the daughter, oral sex with-involving the son, fondling, having the children have them watch them have intercourse, and Mrs. Burns having intercourse with her son. Because of the nature of the acts, there are no scientific or medical evidence. Is there anyone who would demand medical or scientific evidence before they could consider a conviction? Even if the instructions don't require it, it's something that you personally require. You have to have scientific or medical evidence that proves the case, and that you don't consider testimony real evidence. Anyone with that opinion?

The Burnses complain that the question was impermissible because it was designed to obtain a

commitment from the jurors. "The prosecutor prefaced the question with a detailed fact scenario and proffered an explanation for the anticipated lack of medical or scientific evidence," they argue. "Then the prosecutor sought a commitment from the jurors that they would not require such evidence to convict under the hypothesis propounded."

The circuit court is vested with wide discretion to judge the appropriateness of specific questions and conduct during *voir dire. State v. Oates,* 12 S. W.3d 307, 310 (Mo. banc 2000). We will reverse judgment on this ground only if the Burnses can establish that the circuit court abused its discretion and that they suffered prejudice as a result. *Id,* at 311. *Voir dire* seeks to ensure that the defendant receives a fair trial. Consequently, the parties should be given wide latitude in their search for open-minded jurors, free from bias and prejudice. *State v. Clark,* 981 S.W,2d 143, 146 (Mo. banc 1998).

A party may not, however, seek to obtain a juror's commitment or pledge to act in a specific way if certain facts are elicited or contingencies arise at trial, but the party may probe the venire panel to determine whether preconceived prejudices would prevent the panelists from following the court's instructions. *State* v. *Ramsey,* 864 S.W,2d 320, 335-36 (Mo. banc 1993).

The circuit court did not abuse its discretion, nor did the Burnses sustain any prejudice as a result of the prosecutor's questions. The prosecutor was merely attempting to determine whether the jurors could follow the law and consider a conviction even though there was no physical evidence to substantiate the victim's claims, Such questions are proper. *State v. Spidle,* 967 S.W.2d 289, 291-92 (Mo. App. 1998) (statutory rape case involving no forensic evidence in which prosecutor asked whether jurors would require "a particular kind of evidence" before finding

defendant guilty); *State* v. *Crew,* 803 S.W.2d 669, 670 (Mo. App. 1991) (prosecutor asked whether jurors could convict "if the only evidence of guilt of the acts charged consisted of the testimony of a single witness, the victim"); *State v. Jolliff,* 867 S.W.2d 256, 260 (Mo. App. 1993) (prosecutor's question whether the jury would require more than eyewitness testimony to convict was proper).

**IV. Prosecutor's Closing Argument Concerning Sodomy**

In their fourth point, the Burnses contend that the circuit court erred in its handling of the prosecutor's misstatement during closing argument that the Burnses' son had testified that his mother had "sucked his private" about a year before August 1999. The prosecutor was wrong; the boy had said that the incident occurred when he was about six or seven years of age. The Burnses allege they suffered prejudice because "[t]he jury obviously credited the prosecutor's claimed recollection; they found Mrs. Burns guilty. . . even though the actual testimony did not support such a finding."

We will not reverse a judgment because of a circuit court's ruling concerning misstatements made during closing argument in the absence of an abuse of discretion which prejudices the defendant. Abuse of discretion exists only where a statement is plainly unwarranted and clearly injurious to the defendant. *State v. Mahurin,* 799 S.W.2d 840, 844 (Mo. banc 1990). The circuit court may address an error made during closing argument by issuing a curative instruction to the jury. *State v. Johnson,* 22 S.W.3d 183, 191 (Mo. banc 2000). When the circuit court issues a curative instruction to correct a misstatement made during closing argument, the objecting party must request some further relief to be able to argue on appeal that the circuit court should have *sua sponte* given some further relief to remedy the alleged prejudice. *State v. Jackson,* 511 S,W.2d 771, 775

(Mo. 1974). Thus, the issue is not whether the claim is preserved for appeal, but whether the requested remedy was provided.

When the Burnses objected to the prosecutor's misstatement, the circuit court instructed the jury "that arguments of counsel are not evidence. They're not to be considered as such." The Burnses made no further request for relief. The Burnses argue that the circuit court "erred in not sustaining defendants' objection[.]" The circuit court *did* sustain their objection and issued a curative instruction to the jury. It granted the relief that the Burnses sought. Informing the jury that closing arguments are not to be considered as evidence was sufficient to eliminate any potential harm the statement may have caused. *State v. O'Haver,* 33 S.W.3d 555, 561-62 (Mo. App.2000). This is especially true given the prosecutor's acknowledgement that he may have made a mistake.

The circuit court did not abuse its discretion in failing to grant further relief, *sua sponte.* The Burnses' point is without merit.

**V. Motion for New Trial**

Finally, the Burnses argue that the circuit court erred in denying their motions for new trial in which they asserted newly-discovered evidence: that Renea Comstock would testify that she overheard Marsha Burns when Burns told the children to lie about the abuse while they were living at the shelter. Comstock also would testify that she later talked to the children and that they admitted that they were lying about the abuse.

To obtain a new trial on this ground, the Burnses must establish that they learned of the evidence only after the trial and could not have discovered it before trial by exercising diligence, that the evidence is so material that it would probably result in a different outcome in a new trial, and that it is not cumulative or merely impeaching of a witness' credibility. *State* v. *Williams*, 652 S.W.2d 102, 114 (Mo. banc 1983). The circuit court is vested with wide discretion in ruling on motions for new trials based on newly discovered evidence. *Id.*

The circuit court did not err. First, although the Burnses argue that this evidence was discovered after the trial, they make no showing that it could not have been discovered before trial by exercising due diligence. Second, Comstock's testimony is cumulative because Marsha Burns testified that she had told the children to lie. Third, it was impeaching of the credibility of the children who repeatedly testified that the abuse had occurred.

We, therefore, affirm the circuit court's judgment.